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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ESCOBEDO SALAZAR,

Defendant and Appellant.

C055689

(Super. Ct. No.
06F05583)

Defendant Jose Escobedo Salazar was convicted of six counts of lewd conduct with a child under 14 years of age and two counts of attempting to commit the same offense. Sentenced to prison for 18 years, he appeals, contending he was denied due process of law when the trial court (1) permitted the prosecutor to play only a small portion of a pretext call, (2) let a "biased interpreter" explain parts of the call, and (3) allowed the prosecutor to argue the "emotion" of the call. We shall affirm the judgment.

FACTS

The victims, 16 and 20 years old at the time of trial, testified that while living at home with defendant, their mother, and other siblings, defendant molested them. Specifically, J.S. testified that when she was five and six years old, defendant repeatedly French-kissed her and put his hands and tongue on her vagina. Several times, defendant told her not to tell her mother. T.S. testified that when she was in the fourth to sixth grades, defendant repeatedly French-kissed her and groped her buttocks. Neither girl told the other of the molestations, but J.S. later learned T.S. had complained to their aunt about defendant's sexual abuse of T.S.

When J.S. was 15 years old, she began to suffer from depression and had problems with her parents; she believed the problems were caused by defendant's sexual abuse of her. One day, after having an argument with defendant, J.S. called T.S. and asked to meet her at their grandmother's home. There, J.S. told T.S. of the molestations. The girls then told the aunt, and the matter was reported to the sheriff's department.

After interviewing both victims, a detective set up a pretext telephone call from J.S. to defendant. The call was conducted in Spanish, was about 20 minutes long, and was monitored by Detective Juan Hidalgo, who was fluent in Spanish. People's exhibit No. 3 is a CD of the entire call, and People's exhibit No. 4 is a CD of the last minute of exhibit No. 3, which Hidalgo described as being very emotional for both defendant and J.S.

Detective Hidalgo prepared a written summary of People's exhibit No. 3 in English. Using this summary, he testified about the content of the call. It began with J.S. telling defendant she was having nightmares about the two of them and wanted to talk with him about what had happened when she was little and why it had happened. Defendant told her that he loved her, that she could call him whenever she wanted, and that he wanted her forgiveness if he had "offended" her. J.S. asked if "it" happened because he was having problems with "mom." Defendant replied he was "sorry" but "[t]here are things that happened that I just don't know." When J.S. repeated that she did not "understand why [he] did that to [her]," because she was his "daughter," defendant replied, "I'm trying to tell you it's a problem that one has."

J.S. finally became more specific during the conversation, asking defendant "[w]hy couldn't [he] do it with a prostitute" rather than with his "own daughters." Defendant asked for forgiveness from J.S., and she agreed if he promised never again to harm her emotionally, including "[n]othing sexual." Defendant "promise[d]" and said, "I have learned my lesson with what has happened over the past few days. I know the big errors that I committed. I ask for your forgiveness and forgiveness from your sisters."

Exhibit No. 4 was played for the jury without interruption. It was played again, but in segments, with the prosecutor asking Detective Hidalgo for the English translation of what was being said. The People then rested their case.

Several of defendant's relatives testified they had spent time with defendant's family and had never seen defendant act inappropriately with his daughters.

Defendant testified and denied having molested his daughters. He admitted kissing them in a playful manner, but said it was never anything sexual. He explained that he was very emotional during the pretext call and was apologizing for arguments he had with the girls that caused them to move out of the house. During cross-examination of defendant, exhibit No. 4 was again played in its entirety.

Exhibit No. 4 was also played twice for the jury during the prosecutor's closing argument.

DISCUSSION

Although a CD of the entire pretext call was introduced into evidence as People's exhibit No. 3, it was not played for the jury. And although Detective Hidalgo prepared a summary of the entire call, that summary was not introduced into evidence. Only the CD of a portion of the call (People's exhibit No. 4) was played to the jury, and Hidalgo both translated it into English during his testimony and described the "emotion that could be heard." The record also reflects that a written transcript of People's exhibit No. 4 was provided to the jury.

Defendant contends his "right to due process and a fair trial" was violated when the trial court "allowed [Detective] Hidalgo, a biased and unqualified translator, to testify about the contents of [the pretext] phone call and by playing only the portion on which [defendant] was crying," thus allowing the prosecutor to use only a

portion of the call "to urge jurors to find [defendant] guilty."
(Citing Evid. Code, § 356 [when part of a conversation is introduced into evidence by one party, "the whole on the same subject may be inquired into by an adverse party" and, when it is necessary to make the portion of the conversation understood, the whole "may also be given in evidence"]..)

In defendant's view, this not only allowed jurors to take the portion "out of context" and to consider a recording that, according to him, "was incomplete, inaccurate and unintelligible in substantial part," it deprived him of the right to a competent and unbiased translator and permitted the prosecutor to "argu[e] emotion without supporting facts." As we will explain, defendant's arguments are not cognizable in this appeal.

To preserve an issue for review on appeal, a defendant must interpose a specific and timely objection in the trial court on the same ground that he asserts on appeal. (*People v. Partida* (2005) 37 Cal.4th 428, 434.) This "requirement is necessary in criminal cases because a 'contrary rule would deprive the People of the opportunity to cure the defect at trial and would "permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal.'"
(*Ibid.*, citing *People v. Rogers* (1978) 21 Cal.3d 542, 548.)

Here, the defense did not raise in the trial court any of the objections he now raises on appeal. Thus, his due process and fair trial argument is forfeited. (*People v. Partida, supra*, 37 Cal.4th at p. 434.)

Defendant suggests various reasons why his contention should not be deemed forfeited.

First, relying on *People v. Aguilar* (1984) 35 Cal.3d 785 (hereafter *Aguilar*), he claims "the right to an interpreter can only [be] waived by the defendant," a waiver that "must affirmatively appear on the record." The point is of no help to him.

In *Aguilar*, a Spanish-speaking interpreter was appointed for the defendant. (*Aguilar, supra*, 35 Cal.3d at p. 789.) During the trial, for the "benefit of the court and jury" and with defense counsel's acquiescence, but without defendant being consulted, the court "borrowed" the interpreter to function as an interpreter for two Spanish-speaking witnesses who were testifying against the defendant. (*Ibid.*) That procedure left the defendant without an interpreter for a portion of the trial, thereby violating his right under article I, section 14 of the California Constitution, which provides that "[a] person unable to understand English who is charged with a crime has a right to an interpreter *throughout the proceedings.*" (*Id.* at p. 790.) Absent the defendant's personal waiver of his right to the interpreter, reversal was required. (*Id.* at pp. 794-795.)

Here, defendant was appointed an interpreter who remained with him throughout the trial. Consequently, *Aguilar* is not on point.

Second, defendant asserts that we have discretion to decide the issue even though there was no objection in the trial court, and urges us to so exercise it. We decline the invitation for reasons stated in *People v. Romero* (2008) 44 Cal.4th 386: "[A]s a general

rule, 'the failure to object to errors committed at trial relieves the reviewing court of the obligation to consider those errors on appeal.' [Citations.] This applies to claims based on statutory violations, as well as claims based on violations of fundamental constitutional rights. [Citations.]'" [Citation.] The reason for this rule is to allow errors to be corrected by the trial court and to prevent gamesmanship by the defense. [Citations.] We see no reason why the general rule of forfeiture should not be applied to . . . claims of error relating to interpreters for [] witnesses. Here, each of the claimed violations of defendant's rights could easily have been addressed and corrected in the trial court had defendant objected. His failure to do so precludes him from now asserting errors relating to the witness interpreter[]." (*Id.* at p. 411.)

Third, defendant asserts that we should address the merits of his claim of error to determine whether, as defendant contends, he was denied the effective assistance of counsel when his trial attorney failed to raise the claim in the trial court.

However, to establish ineffective assistance by trial counsel, defendant must show not only deficient performance by counsel, but also that he was prejudiced by the deficiency, meaning "there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant." (*In re Alvernaz* (1992) 2 Cal.4th 924, 936-937.) "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies If it is easier to dispose

of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'" (*In re Fields* (1990) 51 Cal.3d 1063, 1079.)

Here, defendant is unable to show either deficient performance by his trial counsel or prejudice from counsel's failure to raise an objection in the trial court on the grounds now asserted on appeal. This is so because, other than the testimony of Detective Hidalgo, the record on appeal does not reveal the content of the portion of the pretext call omitted in exhibit No. 4--content that may well have been unfavorable, not helpful, to defendant. And, absent evidence of the content of the entire call, defendant is unable to show that it was necessary to understand the part contained in People's exhibit No. 4. Defendant also has not shown Hidalgo was inaccurate in any aspect of his translation. Indeed, defendant, who speaks Spanish and had access to the entire call, would have known if the translation by Hidalgo was inaccurate, yet he voiced no such complaint. The mere fact Hidalgo was the detective who investigated the crimes does not, without more, suggest that he was biased to distort the content of the call. As to the prosecutor's argument about the emotion displayed by defendant during the last minute of the pretext call, as evidenced by exhibit No. 4, this was highly relevant. It was a fair comment on the evidence to argue that defendant's crying and sobbing were inconsistent with his being simply upset about arguing with his daughters, as defendant claimed, and instead that his emotions revealed the shame and sorrow he was

experiencing for having molested them. In sum, defendant has failed to carry his burden of showing ineffective assistance.

DISPOSITION

The judgment is affirmed.

SCOTLAND, P. J.

We concur:

HULL, J.

BUTZ, J.